Supreme Court, U.S.
FILED
FEB 27 1995
OFFICE OF THE CLERK

(2)

No. 94-1271

In The

Supreme Court of the United States

October Term, 1994

BEVERLY JOAN CARLISLE, AS NEXT FRIEND OF ANGELA CARLISLE,

Petitioner,

v.

DR. JOHN MUNNA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

ALBERT M. PEARSON, III
BUTLER, WOOTEN, OVERBY, CHEELEY, PEARSON & FRYHOFER
2719 Buford Highway
Atlanta, Georgia 30319
(404) 321-1700

KIRBY L. TURNAGE, JR.
999 Peachtree Street
Suite 1750
Atlanta, Georgia 30309
(404) 872-0000

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

1 cpp

QUESTIONS PRESENTED

1. Whether the Supreme Court of Georgia's denial of Petitioner's interlocutory appeal from the trial court's refusal to compel discovery constitutes a final judgment within the meaning of 28 U.S.C. § 1257?

2. Whether the Supreme Court of Georgia's denial under the abuse of discretion standard of Petitioner's interlocutory appeal from the trial court's refusal to compel discovery constitutes an independent and adequate state ground barring review by this Court?

3. Whether Georgia law which authorizes the award of retroactive child support payments following a determination of paternity creates a classification based on illegitimacy and, if so, whether that classification is constitutionally impermissible?

4. Whether the foregoing constitutional question is ripe for review by this Court given the undeveloped factual record in this case and the many factual contingencies that could render review by this Court unnecessary?

TABLE OF CONTENTS

Page

Jurisdiction 1

Statement of Case 2

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES:

Baugh v. Carver, 444 N.E.2d 58 (Ohio App. 1981) 8

Coleman v. Mackey, 424 So.2d 170 (Fla. App. 1983) 8

Dep't of Rev. v. Roe, 560 N.E.2d 1288 (Mass. App. 1990) 8

Ellison v. Walter, 834 P.2d 680 (Wyo. 1992) 8

Freeman v. Ripley, 339 S.E.2d 795 (Ga. App. 1986) 4

Kathy L.B. v. Patrick J.B., 371 S.E.2d 583 (W.Va. 1988) 8, 9

Mason v. Reiter, 564 So.2d 142 (Fla. App. 1990) 8

Michigan v. Long, 463 U.S. 1032 (1983) 10

Napowsa v. Langston, 381 S.E.2d 882 (N.C. App. 1989) 8, 9

Nixon v. Sandy Springs Fitness Ctr., Inc., 306 S.E.2d 362 (Ga. App. 1983) 4

State ex rel. Coleman v. Clay, 805 S.W.2d 752 (Tenn. 1991) 8

Tidwell v. Booker, 225 S.E.2d 816 (N.C. 1976) 7

Weaver v. Chester, 393 S.E.2d 715 (Ga. App. 1990) .. *passim*

W.M. v. D.S.C., 591 A.2d 837 (D.C. App. 1991) 8

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 10

STATUTES:

O.C.G.A. § 5-6-34 4

O.C.G.A. § 5-6-35 4

28 U.S.C. § 1257 ..... 1, 4, 5, 11

No. 94-1271

In The

Supreme Court of the United States

October Term, 1994

BEVERLY JOAN CARLISLE, AS NEXT FRIEND OF ANGELA CARLISLE,

Petitioner,

v.

DR. JOHN MUNNA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

JURISDICTION

This Court does not have jurisdiction under 28 U.S.C. § 1257 because the order of the Supreme Court of Georgia dated November 3, 1994 does not meet the "final judgment" requirement. Nor does that order draw into question the constitutional validity of any Georgia statute or rule of law.

STATEMENT OF THE CASE

Petitioner's statement of facts is incomplete.

Petitioner Beverly Carlisle gave birth to Angela Carlisle during a marriage which ended in divorce two years ago. Under Georgia law, Angela was and is presumed to be legitimate. Petitioner's former husband believed himself to be Angela's biological father and he supported Angela fully until the divorce. As Respondent understands the facts, this support included all of the out-of-pocket expenses for Angela's upbringing.[1] Petitioner provided care, guidance, emotional support and other parental nurturing. But she did not work outside the home. Petitioner's former husband apparently learned for the first time that Angela was not his daughter during the divorce proceedings. Angela was sixteen years old at the time. Angela is now 18 years old, the age of majority in Georgia. Under Georgia law, the obligation to provide child support ceases at this age.

After her divorce, Petitioner brought a paternity action against Respondent Dr. John Munna, claiming that he, not her former husband, was Angela's biological father. Until the filing of that action, Dr. Munna had no idea that he might be Angela's father. Acting in a thoroughly honorable manner, however, Dr. Munna submitted to a blood test. The test results indicated that Dr. Munna is Angela's father.

---

[1] This appeal arises from a discovery dispute so all pertinent facts relating to the child support issue below have not been fully developed.

Respondent recognizes the legal possibility that he may have to assume some child support obligations under Georgia law. But, at this juncture, there has been no formal adjudication of paternity. A fortiori, the child support question has not and could not have been addressed substantively below. Indeed, several unanswered state law questions remain to be decided, each of which could be dispositive of this case against the Petitioner without ever reaching her tenuous constitutional claim.

When the interlocutory appeal was filed below, this case was in the very early stage of litigation. Discovery in fact was still ongoing. Beverly Carlisle filed a motion to compel discovery. That motion was denied. The application for interlocutory appeal was thereafter taken.

Petitioner's application was first filed in the Supreme Court of Georgia, apparently on the theory that the denial of the motion to compel presented a constitutional question in the procedural context of this case. Because no constitutional question in fact had been raised and because under Georgia law no mandatory jurisdiction attached,[2] the Supreme Court transferred the matter to the Georgia Court of Appeals.

The Court of Appeals summarily denied Petitioner's application for discretionary review. Thereafter, Petitioner applied for certiorari to the Supreme Court of

---

[2] Under Georgia law, a challenge to the constitutionality of a state statute must be appealed to the Supreme Court of Georgia not the Court of Appeals. Constitution of the State of Georgia, Art. VI, § 6, ¶ 2.

Georgia. That petition was similarly denied. Petitioner now asks this Court to render an advisory opinion on a constitutional question which (a) has never been addressed below, (b) was not ripe, in any event, for consideration in the context of Petitioner's motion to compel and (c) may never have to be addressed to resolve this lawsuit.

REASONS FOR DENYING WRIT

1. As indicated above, the order appealed from below was the denial of Petitioner's motion to compel discovery. Under Georgia law, such trial level orders are not considered "final" and the appeal from such an order is discretionary. O.C.G.A. §§ 5-6-34 and -35. Appeal is not available as a matter of right. Moreover, the denial of a motion to compel discovery is resolved in Georgia under the abuse of discretion standard. *See Freeman v. Ripley*, 339 S.E.2d 795 (Ga. App. 1986); *Nixon v. Sandy Springs Fitness Ctr., Inc.*, 306 S.E.2d 362 (Ga. App. 1983).

As stated above, there has been no ruling below – final or otherwise – on either paternity or the extent of Petitioner's right to recover child support. The legal standard which Petitioner attacks as a penalty directed against illegitimate offspring has never been applied to her and may never be. As to that potential question, the Georgia Supreme Court's order denying certiorari can not be considered a final judgment within the meaning of 28 U.S.C. § 1257. Frankly, Respondent's research does not reveal a single decision by this Court which would even remotely lend color to Petitioner's assumption that this

case meets the final judgment requirement. All substantive decisions under state law lie ahead. After all is said and done below, there will be ample opportunity for this Court to say whether a constitutional question is presented for review.[3]

2. To grasp the many state law contingencies which will directly affect Petitioner's ability to raise the constitutional claim she would like this petition to present, the Court should consider the following:

a. The Georgia courts may, and in fact should, reject the claim for full retroactive recovery of child support by a mother under circumstances such as those apparently presented below.

---

[3] Every final judgment opinion that Respondent has reviewed involved a lower court order that at least addressed the underlying constitutional question or could have addressed the question. Neither possibility existed in the instant case since the child support issue remains far down the road if it is ever to be reached at all. None of the exceptions to finality under § 1257 recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975), applies here. Inasmuch as further proceedings of substance remain to be decided, the present case generally fits the pattern exhibited in *Flynt v. Ohio*, 451 U.S. 619 (1981) (despite unsuccessful pre-trial challenge to obscenity prosecution on selective prosecution grounds, case not final under § 1257 until both criminal conviction and imposition of sentence have occurred) and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (no final judgment where state court determined monetary remedy not available for property takings, but left open the possibility of alternative remedies on remand). Of note in the present case is the fact that the record below is far, far less developed than in *Flynt* and *San Diego*.

A newly-created cause of action for retroactive recovery of child support expenses on behalf of a non-marital child was first recognized in Georgia in 1990. *Weaver v. Chester,* 393 S.E.2d 715 (Ga. App. 1990). In *Weaver,* the State Department of Human Resources sued Chester, alleging paternity of a non-marital child on whose behalf the department had paid public assistance benefits.

The child's mother was added to the state's suit as a plaintiff seeking reimbursement for actual expenditures she made on behalf of the child for periods of time during which the child was not receiving public assistance benefits. During those periods she was the child's sole provider and, in light of the obligation of both parents to support a child, the mother's theory was that she was entitled to reimbursement for the father's share of the expenses. Based on prior law, the trial court found "no legal basis" for such a claim. Drawing upon an analogy to the criminal law of child abandonment, the Georgia Court of Appeals, held:

> If a father can be imprisoned for having failed to support his child during the period before a judicial determination of paternity was made, there would appear to be no bar to the entry of a civil judgment against him to enforce the same support obligation.

Id. at 717.

In further support of the common-law creation of this cause of action, the court cited a provision of the Uniform Reciprocal Enforcement of Support Act authorizing an out-of-state custodian to seek reimbursement for actual child support expenditures and a North Carolina

Supreme Court case holding that a father's duty to support "arises when the child is born." *Tidwell v. Booker*, 225 S.E.2d 816 (N.C. 1976). The court also cited appellate cases in several other jurisdictions.

While Petitioner, in essence, seeks to have this Court address the constitutionality of the *Weaver* rule, several points are crucial to a complete understanding of the possible applicability of *Weaver* to the current case. First, and most important, its facts differ significantly from those which likely will emerge in the instant case. The child in *Weaver* had been supported, prior to the litigation, by his unmarried mother, sometimes with help from public assistance payments by the state. In the instant case, the child was supported through most of her minority by the Petitioner and her former husband, who treated the child as his own until the divorce. The facts which have been developed to this point suggest that all or virtually all out-of-pocket financial support was provided primarily by the Petitioner's former husband.

Thus, it is not at all apparent that the *Weaver* rule is applicable to the facts of the current case. It is possible that the Georgia Supreme Court, when it gets its first opportunity to deal with *Weaver*'s newly-recognized cause of action, will reject judicial creation of such a remedy. Despite the considerations which underlie it, the *Weaver* rule would require in some cases the determination of expenditures incurred many years ago. Given the problems of proof that the *Weaver* rule might engender, it is possible that the Georgia Supreme Court will confine such child support claims to prospective relief alone.

b. Alternatively, the Georgia Supreme Court might accept the *Weaver* rule, but limit its coverage to situations where the custodial parent has supported the child alone and seeks reimbursement for those expenditures from the non-custodial parent. None of the courts which have recently recognized the claim for reimbursement of child support have dealt with a case in which the child had lived with a step-parent and had received support throughout his minority from a biologically unrelated person. *See, e.g., Ellison v. Walter,* 834 P.2d 680 (Wyo. 1992); *State ex rel. Coleman v. Clay,* 805 S.W.2d 752 (Tenn. 1991); *Kathy L.B. v. Patrick J.B.,* 371 S.E.2d 583 (W.Va. 1988); *W.M. v. D.S.C.,* 591 A.2d 837 (D.C. App. 1991); *Mason v. Reiter,* 564 So.2d 142 (Fla. App. 1990); *Napowsa v. Langston,* 381 S.E.2d 882 (N.C. App. 1989); *Dep't of Rev. v. Roe,* 560 N.E.2d 1288 (Mass. App. 1990); *Coleman v. Mackey,* 424 So.2d 170 (Fla. App. 1983); *Baugh v. Carver,* 444 N.E.2d 58 (Ohio App. 1981).

While accepting plaintiff's claim that courts should generally order reimbursement for child support expenses once defendant's paternity has been determined, the Ohio appellate court in *Baugh v. Carver, supra,* went on to limit such recovery where there was:

> [A]n affirmative demonstration of some circumstance which ought reasonably to relieve the father of this obligation and the child of this entitlement.

444 N.E.2d at 61. If the instant litigation is permitted to proceed without intervention by this Court early in the litigation process, the Georgia courts may indeed determine that the facts of this case constitute such "an affirmative demonstration." The child was raised until the

age of sixteen by her mother and by a man the child believed to be her "father." The support was consistent with the latter's earning power. Retroactive child support at this point is unnecessary and, to the extent that Petitioner's former husband was the family breadwinner, any reimbursement to the Petitioner unrelated to her own *actual* expenditures would provide a windfall. The Georgia courts may well decide that the Petitioner in this case is entitled to no reimbursement at all.

c. Even if *Weaver* is accepted as generally applicable to a case like the present one, a number of state law issues remain uncertain and, depending upon their resolution, they could significantly alter the posture of the case and ultimately would make the present constitutional challenge to the basic rule of *Weaver* moot or a mere advisory opinion. For example, it is possible that the courts might find that any action in this case was barred or limited by the statute of limitations. In *Napowsa v. Langston, supra*, the court held that this kind of action was, in fact, an action by a creditor against a debtor and, thus, limited by the three-year statute of limitations. A finding that a statute of limitations was applicable here might lead the Petitioner to abandon the suit altogether or might serve as a complete defense for the Respondent.

d. Similarly, the equitable doctrine of laches has been held applicable in child support reimbursement cases by the West Virginia Supreme Court in *Kathy L.B. v. Patrick J.B., supra*. This rule, if recognized on the facts presented here, would encourage the early judicial resolution of disputed paternity claims which can be quite fact-intensive and difficult. The instant case would seem

to be a particularly appropriate case to apply such a doctrine in light of the Petitioner's sixteen year delay in bringing the action.

e. A final question left open at this point in the nascent Georgia jurisprudence on this subject is the role of the former husband in this litigation. It would seem if reimbursement is granted for child support expenditures, the reimbursement should go to the former husband to the extent he supported a child which was not his. That, in turn, would require a determination of how much of the actual expenditures were chargeable to the mother (who was obligated to support her child) and how much were chargeable to her former husband (who was not obligated). How to conduct this inquiry, particularly in a non-community property state which applies equitable distribution on divorce, is a question which does not yield a self-evident answer. The Georgia Supreme Court's answer to this question will undoubtedly affect the posture of this case.

3. The foregoing contingencies would not only have an effect on whether the illegitimacy question is ever reached in this case; they would also provide independent and adequate state law grounds for decision. *See Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977). Assuming that the finality requirement of § 1257 is otherwise satisfied, the independent and adequate state ground doctrine would operate as a bar to Supreme Court review.

4. Finally, the underlying premise of the instant petition for a writ of certiorari is that the *Weaver* rule

unconstitutionally discriminates against illegitimate children. This premise is erroneous. Under Georgia law, all children – whether legitimate or illegitimate – have the same right to child support following a determination of paternity. Georgia law, however, applies a different standard for fixing child support obligations prospectively than it does retrospectively. If the support order goes back in time, the father must reimburse the mother for his share of out-of-pocket expenditures. For the future, the amount of child support is determined based on the need of the child and the father's current earning capacity. Under the *Weaver* rule, this distinction is based on the timing of the determination of paternity, not the child's status as legitimate or illegitimate. The distinction is also based upon the obvious difficulty of proving past ability to pay child support (which may no longer reflect present reality) as opposed to past out-of-pocket expenditures on behalf of a child (which represent hard earned dollars that have come from someone's pocket).

The approach to child support reflected in the *Weaver* rule is reasonable and substantially related to Georgia's objective of providing support for all children from their biological fathers. The rule in no way singles out illegitimate children and subjects them to a legal burden that legitimate children do not have to bear.

CONCLUSION

Because the order of the Georgia Supreme Court below is not final within the meaning of 28 U.S.C. § 1257, the petition for certiorari should be denied. In addition,

the denial of Petitioner's motion to compel rests on an independent and adequate state ground ("the abuse of discretion standard") and this provides a second ground for denying the petition. Next, the Georgia rule under constitutional attack does not create a classification based on illegitimacy and, for that reason, the petition should be denied outright. Finally, the procedural and factual posture of this case is so undeveloped that it does not provide a vehicle through which this Court can enunciate a meaningful principle of constitutional law without violating its own self-imposed rule against issuing advisory opinions.

Respectfully submitted,

ALBERT M. PEARSON, III
Counsel of Record for Petitioner

KIRBY L. TURNAGE, JR.
Attorney for Petitioner